UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IGNACIO BARAJAS MACIAS,
Petitioner,
vs.
BILL DONAT, et al.,
Respondents.

Case No. 3:06-CV-00631-HDM-(RAM)

ORDER

Before the Court are the First Amended Petition for Writ of Habeas Corpus (#17), Respondents' Answer (#34), and Petitioner's Reply (#38). The Court finds that Petitioner is not entitled to relief and denies the First Amended Petition (#17).

Petitioner was charged in the Second Judicial District Court of the State of Nevada with three counts of trafficking in a controlled substance. Trafficking has three levels of punishment, depending upon the weight of the controlled substance involved. See Nev. Rev. Stat. § 453.3385. In Petitioner's case, Count I count was first-level trafficking (four grams to less than fourteen grams), Count II was second-level trafficking (fourteen grams to less than twenty-eight grams), and Count III was third-level trafficking (twenty-eight grams and more). Ex. 3 (#18-4).

Petitioner declined an offer of a plea agreement and elected to go to trial. The plea offer was for a second-level trafficking count.[1] Ex. 21, p. 47 (#19-5, p. 48).[2] Soon after the jury was selected, Petitioner decided to plead guilty. The prosecution declined to reinstate the plea offer. Ex. 22, p. 6 (#19-6, p. 7). Petitioner pleaded guilty to the crimes as charged, and the prosecution was free to argue about the appropriate sentences. Ex. 6, p. 3 (#18-7, p. 5). At sentencing, Petitioner moved to withdraw his plea, and the court denied his motion. Ex. 7 (#18-8). The court sentenced Petitioner to one to three years imprisonment for Count I, two to seven years imprisonment for Count II, and ten to twenty-five years imprisonment for Count III; the terms run concurrently. Ex. 8 (#18-9). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 12 (#18-13). Petitioner then filed a post-conviction habeas corpus petition in state court. Ex. 15 (#18-16). The court appointed counsel, who filed a supplement. Ex. 16 (#18-17). The court conducted an evidentiary hearing. Ex. 21, 22, 23 (#19-5, #19-6, #19-7). The court then denied the petition. Ex. 24 (#19-8). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 32 (#19-16). Petitioner then commenced this action.

"A federal court may grant a state habeas petitioner relief for a claim that was adjudicated on the merits in state

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[1]It is unclear whether the offer was to plead guilty to only one count of second-level trafficking or to drop the third-level trafficking count down to second-level trafficking.

[2]Page numbers in parentheses refer to the documents in the Court's computerized docket.

court only if that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" Mitchell v. Esparza, 540 U.S. 12, 15 (2003) (quoting 28 U.S.C. § 2254(d)(1)), or if the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

> A state court's decision is "contrary to" our clearly established law if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." A state court's decision is not "contrary to . . . clearly established Federal law" simply because the court did not cite our opinions. We have held that a state court need not even be aware of our precedents, "so long as neither the reasoning nor the result of the state-court decision contradicts them."

Id. at 15-16. "Under § 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (internal quotations omitted).

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the

> more leeway courts have in reaching outcomes in case-by-case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

> When it comes to state-court factual findings, [the Antiterrorism and Effective Death Penalty Act] has two separate provisions. First, section 2254(d)(2) authorizes federal courts to grant habeas relief in cases where the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Or, to put it conversely, a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable. Second, section 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and that this presumption of correctness may be rebutted only by "clear and convincing evidence."
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> We interpret these provisions sensibly, faithful to their text and consistent with the maxim that we must construe statutory language so as to avoid contradiction or redundancy. The first provision—the "unreasonable determination" clause—applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record. Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, that the process employed by the state court is defective, or that no finding was made by the state court at all. What the "unreasonable determination" clause teaches us is that, in conducting this kind of intrinsic review of a state court's processes, we must be particularly deferential to our state-court colleagues. For example, in concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. Similarly, before we can determine that the state-court factfinding process is defective in some material way, or perhaps non-existent, we must more than merely doubt whether the process operated properly. Rather, we must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.

Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir. 2004).

"Rule 7 of the Rules Governing § 2254 cases allows the district court to expand the record without holding an evidentiary hearing." Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005). The requirements of § 2254(e)(2) apply to a Rule 7 expansion of the record, even without an evidentiary hearing. Id. "An exception to this general rule exists if a Petitioner exercised diligence in his efforts to develop the factual basis of his claims in state court proceedings." Id.

The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

In Ground 1, Petitioner claims that the trial court abused its discretion in denying his motion to withdraw his guilty plea, because his plea was unknowing and involuntary. A defendant's guilty plea must be entered knowingly and voluntarily, and the court record must reflect that fact. Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). On direct appeal, the Nevada Supreme Court held:

> In the instant case, the district court's finding that Barajas entered a knowing and voluntary plea is supported by substantial evidence. At the plea canvass, the district court advised Barajas of the constitutional rights he was waiving in entering a guilty plea, the elements of the charged offenses, and the direct consequences resulting from the plea. Barajas admitted that he committed the charged offense and represented to the district court that he wanted to plead guilty, rather than have the jury, which was already impaneled and had heard evidence in the case, decide his guilt or innocence. Therefore, Barajas' claims that he was pressured into pleading guilty and did not understand what he was "answering to" by pleading guilty are belied by the record. Accordingly, the district court did not abuse its discretion in denying Barajas' presentence motion to withdraw.

Ex. 12, pp. 2-3 (#18-13, pp. 3-4). The hearing on the change of plea confirms the analysis of the Nevada Supreme Court. See Ex. 6 (#18-7). Petitioner used an interpreter, and there was some confusion between question, answer, and interpretation at one point in the proceedings. Ex. 6, p. 10 (#18-7, p. 12). However, the questions were complicated, and once the judge simplified his questions, Petitioner answered in accordance with the answers that he gave at other points in the proceedings. At the sentencing hearing, Petitioner wanted to withdraw his plea. However, he did not give any reason why he wanted to withdraw his plea except that he felt a lot of pressure and headaches once the trial started. Ex. 7, p. 2 (#18-8, p. 4). Under those circumstances, the Nevada Supreme Court reasonably applied Boykin and Brady. 28 U.S.C. § 2254(d)(1).

Ground Two contains three claims of ineffective assistance of trial counsel, Kevin Van Ry. "[T]he right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even

to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

Strickland expressly declines to articulate specific guidelines for attorney performance beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the duty to advocate the defendant's cause, and the duty to communicate with the client over the course of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel's duties so exhaustively as to give rise to a "checklist for judicial evaluation of attorney performance. . . . Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-89.

Review of an attorney's performance must be "highly deferential," and must adopt counsel's perspective at the time of the challenged conduct to avoid the "distorting effects of hindsight." Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (citation omitted).

The Sixth Amendment does not guarantee effective counsel per se, but rather a fair proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v. Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell below an objective standard of reasonableness alone is insufficient to warrant a finding of ineffective

assistance. The petitioner must also show that the attorney's sub-par performance prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that, but for the attorney's challenged conduct, the result of the proceeding in question would have been different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Ground Two(A), Petitioner argues that counsel failed to ensure that the plea agreement was in written form, as required by Nev. Rev. Stat. § 174.035.[3] The state district court held that the failure to obtain a written plea agreement was harmless error because Petitioner's plea was voluntary. Ex. 24, p. 3 n.3 (#19-8, p. 4) (citing Ochoa-Lopez v. Warden, 992 P.2d 136 (Nev. 2000)). This Court's concern is not whether the state court should have followed state law, but whether Petitioner's custody violates federal law. The Supreme Court of the United States has not held that a guilty plea requires a written memorandum. As noted above, the Supreme Court has held only that a guilty plea be knowing and voluntary, and that a plea agreement be on the record. As noted with Ground 1, Petitioner's plea met those conditions. Therefore,

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[3]At the time, § 174.035 stated, in relevant part:

> 6. A defendant may not enter a plea of guilty or guilty but mentally ill pursuant to a plea bargain for an offense punishable as a felony for which:
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> (a) Probation is not allowed; or
>
> (b) The maximum prison sentence is more than 10 years, unless the plea bargain is set forth in writing and signed by the defendant, the defendant's attorney, if he is represented by counsel, and the prosecuting attorney.

counsel was not ineffective because he did not ensure that the plea agreement was is writing.

In Ground Two(B), Petitioner argues that counsel did not adequately investigate Petitioner's case, by learning the identity of the confidential informant. Before the grand jury, the informant testified that he worked with police to purchase methamphetamine from Petitioner. The police searched the informant before the transactions, placed listening devices upon the informant, and gave him money. The informant then purchased methamphetamine from Petitioner. The informant returned to the police, who searched him after the transactions. Ex. 2, pp. 18-21 (#18-3, pp. 20-23). Petitioner argues that counsel never discovered the name of the informant to determine whether the public defender had represented the informant, thus causing a conflict of interest. Petitioner also argues that if the prosecution refused to disclose the identity of the informant, then the case would have been dismissed pursuant to Nev. Rev. Stat. § 49.365.

The evidence does not bear out Petitioner's contentions. At the state-court evidentiary hearing, counsel testified that although he did not remember the name of the confidential informant in this case, as a matter of course he would ask the prosecution for the identity of the confidential informant and check for any conflicts of interest. Ex. 22, pp. 20-22 (#19-6, pp. 20-22). Petitioner's contends that the Court cannot accept counsel's testimony as fact that he actually learned the identity of the informant and checked for a conflict. Petitioner, not Respondents, has the burden of proof in this action; he must prove that counsel

did not learn or attempt to learn the identity of the confidential informant. Petitioner did not present any such evidence at the state-court evidentiary hearing. Consequently, he failed to prove that counsel acted deficiently.

In Ground Two(C), Petitioner argues that counsel failed to investigate Petitioner's complaints of headaches and dementia. "Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." Douglas v. Woodford, 316 F.3d 1079, 1085 (9th Cir. 2003). On this issue, the state district court held:[4]

> b. The court also finds that Van Ry testified credibly that Macias never mentioned anything to him about faulty translation, the absence of a meaningful plea bargain, headaches, or being pressured into pleading guilty as grounds for withdrawing the pleas. [n.6: To the extent that Macias alleged that counsel was ineffective in failing to "investigate Petitioner's basis for physical and mental incapacitation complaints of headaches and dementia," the court finds that, as pleaded, this is a naked allegation of ineffective assistance of counsel and thus fails to plead facts which, if true, would warrant relief.] Macias' testimony to the contrary is not credible.

Ex. 24, pp. 5-6 (#19-8, pp. 6-7). Counsel did remember Petitioner telling him, around the time of the jury selection and the change of plea, that he was having a headache. Ex. 21, p. 51 (#19-5, p. 52). Counsel also remembered that Petitioner was regretting what he did and the effect that his actions had upon his family. A headache, by itself in a stressful situation like a criminal trial, is not something that would cause a reasonable counsel to

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[4]The Nevada Supreme Court summarily affirmed the district court on this issue. This Court looks through to the reasoned decision of the district court. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

investigate a client's mental condition. The state district court reasonably applied Strickland. 28 U.S.C. § 2254(d)(1).

Ground Three is a claim that the trial court abused its discretion in failing to adhere to Nev. Rev. Stat. § 174.035, which requires certain plea agreements to be in writing. As the Court has noted with respect to Ground Two(A), the Supreme Court of the United States has not held that a plea agreement must be in writing, only that it be on the record. Furthermore, as the Court has noted with respect to Ground One, the hearing on Petitioner's change of plea meets that requirement. Ground Three is without merit.

Ground Four is a claim of cumulative error. The Court not having found any error in the proceedings, there is no cumulative error, and this ground is without merit.

IT IS THEREFORE ORDERED that Petitioner's First Amended Petition for Writ of Habeas Corpus (#17) is **DENIED**. The Clerk of the Court shall enter judgment accordingly.

DATED: November 30, 2009.

Howard D McKibben

HOWARD D. MCKIBBEN
United States District Judge